Supreme Court, U.S.
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(3)

No. 97-891

In The

Supreme Court of the United States

October Term, 1997

SHEETZ, INC.,

Petitioner,

v.

CHERYL L. VANDEVENDER,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

In the opposing brief submitted by Respondent in this case, Respondent asserts that Petitioner's Writ of Certiorari should be denied not for reasons relating to the merits of the case but because Petitioner failed to preserve a federal question for appellate review. Respondent's assertion is simply contrary to the facts and the law in this case.

In the first instance, in Petitioner's Motion for Judgment Notwithstanding the Verdict and/or For a New Trial and/or Remittitur and Memorandum In Support Thereof, Petitioner timely raised the issue of the constitutionality of the punitive damages awards before the trial court.[1] Respondent's App. 6a. Petitioner preserved this constitutional issue in its Petition for Appeal to the West Virginia Supreme Court of Appeals wherein it argued that the punitive damages awards should be set aside because they were grossly excessive in violation of the Due Process Clause.

Furthermore, it is clear from a review of the state supreme court's decision in this case that the federal issue as to the constitutionality of the punitive damages awards was addressed, considered and decided by the state supreme court.[2] In its decision the state supreme court set forth the federal issue presented on appeal.

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[1] Respondent faults Petitioner for failing to assert any affirmative constitutional defense to punitive damages in its answers to Respondent's complaint and amended complaint. It is obvious that it is impossible to object to the excessiveness of a verdict until the excessive verdict is returned.

[2] Even Respondent concedes that the state supreme court considered the constitutional issue. ("Now, although the

> Sheetz asserts that under the standards set forth by the United States Supreme Court in *BMW of North America, Inc. v. Gore*, ___ U.S. ___, 116 S. Ct. 1589 (1996), the punitive damages award was grossly excessive in violation of Sheetz' due process rights.

Petitioner's App. 11. The state supreme court did not find such issue to be waived but rather undertook a lengthy examination of such issue. The state supreme court stated, "Returning to the *crux of this appeal*, we must now examine whether the punitive damages award was excessive." Petitioner's App. 26 (emphasis added). In reviewing the constitutionality of the award, the state supreme court rejected Petitioner's argument that *BMW* altered the factors to be considered in reviewing a punitive damages award. The court stated:

> While we disagree with Sheetz' contention that *BMW* somehow altered the review factors previously identified in *Garnes*, we do wish to address this argument. While the *BMW* decision clearly delineates three "guideposts" for use in connection with the review of punitive damage awards, these so-called "guideposts" are merely reiterations of factors previously-adopted by both this Court and the United States Supreme Court. Contrary to Sheetz' position that *BMW* somehow alters this State's law on punitive

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appellate court reviewed the punitive damage awards for excessiveness and expressly found that the trial court's review included each of the 'guideposts' addressed in *BMW v. Gore*, 517 U.S. ___, 116 S. Ct. 1589 (1996) (Petitioner's App. A, p. 33), Petitioner argues that, first, the trial court's review and, next, the appellate court's review violated its constitutional right to Due Process.") Respondent's Brief, p. 6.

> damages review, each one of the "guideposts" was in fact applied by the trial court in its review of this case. Other than utilizing the "guidepost" terminology, *BMW* does not depart from existing law regarding punitive damages.

Petitioner's App. 33.

In its decision the state supreme court considered (and rejected in part) Petitioner's argument that the punitive damages awards were grossly excessive.[3] Petitioner's appeal to vacate the punitive damages awards for federal constitutional reasons was denied on the merits, not for the reason that the issue was not preserved for appeal. The state supreme court's consideration of and ruling on the constitutional question creates an irrebuttable presumption that the federal question was properly preserved. *See, e.g., Cohen v. Cowles Media Co.*, 501 U.S. 663, 667 (1991) ("It is irrelevant to this Court's jurisdiction whether a party raised below and argued a federal-law issue that the state supreme court actually considered and decided."); *Orr v. Orr*, 440 U.S. 268, 274-75 (1979) ("[I]t is irrelevant to inquire when a Federal question was raised in a court below when it appears that such question was actually considered and decided. . . . " (quoting *Manhattan Life Ins. Co. of New York v. Cohen*, 234 U.S. 123,

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[3] The state supreme court determined that since Petitioner's conduct toward Respondent with regard to Respondent's claims for unlawful termination and failure to rehire lacked evidence of malice or intent to harm the Respondent, the punitive damages awarded in connection with such claim should be reduced by $466,260. The court upheld the $1,124,000 punitive damage award in connection with Respondent's retaliation claim.

134 (1914)); *Raley v. Ohio*, 360 U.S. 423, 436 (1959) ("There can be no question as to the proper presentation of a federal claim when the highest state court passes on it.").

Respondent takes the position that the federal constitutional issues presented in this case were not preserved. As set forth above, such position is both inaccurate and irrelevant. As this case now comes before this Court, the Respondent is the beneficiary of a multi-million dollar punitive damage award granted to her as a result of receiving a form termination letter and lifting a six-pack of soda.

In light of the Respondent's misplaced reliance on waiver arguments and failure to address the issues presented in Petitioner's Writ of Certiorari, the need for plenary review of the punitive damages awards in the action below is required. Accordingly, Petitioner's Writ of Certiorari should be granted.

Respectfully submitted,

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